

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
MMM License LLC	)	
	)	CSR-5837-N
For Waiver of §76.92(f) of	)	
the Commission's rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 18, 2002**

**Released: October 21, 2002**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. MMM License LLC, licensee of television broadcast station KTMF (ABC, Ch. 23), Missoula, Montana ("KTMF"), has filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules (47 C.F.R. §76.92(f)). Subsequently, KTMF submitted a supplement to its petition. No opposition to this petition has been received. For the reasons discussed below, we grant the petition.

**II. BACKGROUND**

2. Upon the request of a local station with the exclusive rights to distribute a network program, a cable operator generally may not carry a duplicating network program broadcast by a distant station.<sup>1</sup> The Commission's rules in general provide such protection within a station's 35-mile geographic zone.<sup>2</sup> Under Section 76.92(f) of the Commission's rules, however, a local station may not exercise this right if an otherwise distant station is considered "significantly viewed" within the community served by the cable system.<sup>3</sup> The significantly viewed exception to the Commission's exclusivity rules is based on an otherwise distant station establishing that it receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the Commission's exclusivity rules because it has established that it can be received over the air in the subject communities.

3. Station KTMF seeks a waiver of the significantly viewed exception to the Commission's network nonduplication rules so that it may enforce its right to network nonduplication against Station KXLY-TV (ABC, Ch. 4), Spokane, Washington ("KXLY-TV"). KXLY-TV is currently considered to be

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<sup>1</sup>See 47 C.F.R. §76.92.

<sup>2</sup>The 35-mile geographic zone extends from the reference point of the community of license of the television station. See 47 C.F.R. §§73.658 and 76.53.

<sup>3</sup>47 C.F.R. §§76.5(i) and 76.54.

significantly viewed in Flathead County, Montana, where the community of Kalispell, served by AT&T Broadband, is located.<sup>4</sup>

4. In *KCST-TV, Inc.*, the Commission held that in order to obtain a waiver of Section 76.92(f) of the Commission's rules, petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific noncable viewing data, to one standard error.<sup>5</sup> For each year, the data must be obtained as a result of independent professional surveys taken during two one-week periods separated by at least thirty days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.<sup>6</sup>

### III. DISCUSSION

5. In support of its petition, KTMF argues that both it and KXLY-TV are ABC network affiliates.<sup>7</sup> KTMF states that it is licensed to Missoula, Montana, which is part of the Missoula DMA while KXLY-TV, which is licensed to Spokane, Washington, is part of the Spokane DMA. KTMF states that, except for the fact that KXLY-TV is considered to be significantly viewed in Flathead County, it would be entitled to assert network nonduplication protection against KXLY-TV for AT&T's cable system serving the community of Kalispell.<sup>8</sup> KTMF points out that KXLY-TV's transmitter site is approximately 140 miles from Kalispell and is separated from that community not only by the state of Idaho, but also by mountainous terrain.<sup>9</sup> Moreover, KTMF states that not only does KXLY-TV's Grade B contour fall short of Flathead County, but its signal is delivered to the cable headend by microwave.<sup>10</sup>

6. KTMF argues that KXLY-TV no longer meets the significantly viewed requirements set forth in Section 76.54(b) of the Commission's rules.<sup>11</sup> In support, KTMF submits the results of independent professional surveys conducted by Nielsen Media Research to demonstrate that KXLY-TV is no longer significantly viewed in Kalispell. The data are the results of a community-specific Nielsen tabulation based on data for non-cable homes in the zip codes of the Kalispell AT&T franchise area.<sup>12</sup> The first year survey's audience estimates were based on February 2000/May 2000 data and the second year's estimates on February 2001/May 2001 data.<sup>13</sup> KTMF states that KXLY-TV's share of total

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<sup>4</sup>KXLY-TV was deemed significantly viewed in Flathead County on the basis of the Commission's original surveys for significantly viewed status. See *Reconsideration of the Cable Television Report and Order*, Appendix B, 36 FCC 2d 326 (1972).

<sup>5</sup>103 FCC 2d 407 (1986).

<sup>6</sup>See 47 C.F.R. §76.54(b).

<sup>7</sup>Petition at 2.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>47 C.F.R. §76.54(b).

<sup>12</sup>Petition at Attachment 2. KTMF also submits survey results for the non-cable homes of Flathead County as a whole. As they are not relevant to KTMF's request, however, those results are not included here.

<sup>13</sup>Supplement to Petition. KTMF initially submitted audience data that averaged the weekly rating, weekly shares and net weekly circulation shares of four four-week sweep periods. This survey information was deficient because it provided the results of four four-week survey periods, instead of two, and omitted the necessary standard

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viewing hours in noncable homes in Kalispell falls below the required 3 percent minimum, within one standard error, as shown in the table below:

<u>Survey Year</u> <sup>14</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 00	41	.93	.53	10.18	5.49
May 00	40	.80	.36	12.70	5.60
Feb. 01	54	.51	.44	4.45	2.67
May 01	29	1.12	.63	7.11	4.11

7. We find that, as required by the Commission, KTMF has provided two sets of community-specific survey results for the community of Kalispell, Montana, for each year surveyed. Section 76.5(i) of the Commission's rules requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>15</sup> The February 2000 reported results for KXLY-TV, with one standard error added, are 1.46 percent share of total viewing hours and a 15.67 percent net weekly circulation; for May 2000 the shares are 1.10 percent share of total viewing hours and a net weekly circulation of 18.30 percent. For February 2001, the reported results for KXLY-TV with the standard errors added are .95 percent share of total viewing hours and a net weekly circulation of 7.12 percent; for May 2001, the shares are 1.75 percent share of total viewing hours and a net weekly circulation of 11.22 percent. For both years, the share of total weekly viewing hours and the net weekly circulation both fall below the required 3 percent and 25 percent minimum for significantly viewed status when the standard errors are considered. Accordingly, we find that the submitted audience surveys are sufficient to show that KXLY-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Kalispell, Montana.

8. For the above reasons, we find that a grant of the waiver of the significantly viewed exemption to the network nonduplication rules with regard to the community-specific survey for Kalispell, Montana, will serve the public interest.

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errors. KTMF submitted corrected data in its supplement.

<sup>14</sup>The survey dates of February 2000/May 2000 and February 2001/May 2001 meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

<sup>15</sup>47 C.F.R. §76.5(i).

**IV. ORDERING CLAUSES**

9. Accordingly, **IT IS ORDERED**, that the petition filed by MMM License LLC **IS GRANTED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>16</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>16</sup> 47 C.F.R. §0.283.